

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

ELIZABETH SINES, SETH
WISPELWEY, MARISSA BLAIR, APRIL
MUNIZ, MARCUS MARTIN, NATALIE
ROMERO, CHELSEA ALVARADO,
JOHN DOE, and THOMAS BAKER,

Plaintiffs,

v.

JASON KESSLER, et al.,

Defendants.

Civil Action No. 3:17-cv-00072-NKM-JCH

**DECLARATION OF ALAN LEVINE, ESQ. IN SPPORT OF PLAINTIFFS' MOTION
FOR DIRECT ACCESS TO CERTAIN DISCOVERY OF DEFENDANT KESSLER**

I, Alan Levine, Esq., pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a senior counsel at the law firm Cooley LLP, one of the law firms representing Plaintiffs in this action.
2. I submit this Declaration in support of Plaintiffs' Motion for Direct Access to Certain Discovery of Defendant Kessler ("Kessler").
3. On or about January 25, 2018, Plaintiffs served Kessler with Plaintiffs' First Set of Interrogatories and Plaintiffs' First Set of Requests for Production of Documents. True and correct copies of Plaintiffs' First Set of Interrogatories and First Set of Requests for Production of Documents are attached as Exhibits 1 and 2 to this Declaration.
4. On or about April 11, 2018, Kessler responded to Plaintiffs' First Set of Interrogatories and First Set of Requests for the Production of Documents. In his untimely response to

Plaintiffs' discovery requests, Kessler identified only a single email account as containing communications relevant to Plaintiffs' discovery requests: [REDACTED].

A true and correct copy of Kessler's response is attached as Exhibit 3 to this Declaration.

5. On May 15, 2018 and May 16, 2018, Kessler also sat for a deposition in this action. During two days of sworn testimony, Defendant Kessler testified only as to his use of his previously disclosed email account, [REDACTED]. Kessler did not disclose any additional email accounts throughout the course of his deposition. A true and correct copy of relevant excerpts from Defendant Kessler's deposition transcript is attached to this Declaration as Exhibit 4.
6. On October 2, 2018, Plaintiffs filed a motion to compel requesting that the Court order Defendants to permit inspection and imaging of their electronic devices and social media accounts. (Dkt. 354.) As of the filing of Plaintiffs' motion to compel, Kessler had not produced any documents from his imaged electronic devices responsive to the search terms provided by Plaintiffs on July 19, 2018. (Dkts. 354, 354-27).
7. On November 13, 2018, the Court granted Plaintiffs' motion to compel and, on November 19, 2018, the Court further entered a Stipulation and Order for the Imaging, Preservation and Production of Documents, which established a process for the review of Defendants' documents. (Dkts. 379, 383.) Under this system, Defendants were first required to complete and provide an ESI Certification to Plaintiffs within 14 days of the date of the entry of the Stipulation and Order. (Dkt. 383.) Defendants were then required to "make available to the Third Party Discovery Vendor for imaging and collection any Electronic Device or Social Media Account identified on Exhibit A and selected by Plaintiffs pursuant to this paragraph" within 28 days. (*Id.*) Following those submissions, the Third Party

Discovery Vendor would image the documents applying mutually agreed search parameters, after which Defendants would “review the results of the collection and produce to Plaintiffs those non-privileged Documents that are responsive to the Discovery Requests.” (*Id.*)

8. On or about December 5, 2018, Kessler provided Plaintiffs with his ESI Certification pursuant to the Court’s Order compelling production. Kessler once again identified his single the email account, [REDACTED]. A true and correct copy of Defendant Kessler’s ESI Certification is attached as Exhibit 5 to this Declaration.
9. On or about April 10, 2019, well over one year since Plaintiffs served Kessler with their initial discovery requests, Defendant Kessler provided Plaintiffs with a Supplemental ESI Certification which, for the first time, disclosed the existence of two additional email accounts: [REDACTED] and [REDACTED]. A true and correct copy of Kessler’s Supplemental ESI Certification is attached as Exhibit 6 to this Declaration.
10. On October 18, 2019, Kessler’s counsel sent Plaintiffs’ counsel an email explaining that he had inadvertently failed to pass along additional social media accounts identified by Kessler more than four months prior. Kessler’s counsel accordingly forwarded an email from Kessler dated June 17, 2019, in which Kessler disclosed multiple accounts on the Russian social media platform VK registered with the username [REDACTED]. Additionally, Kessler indicated that he registered a now defunct Facebook account with the username [REDACTED]. True and correct copies of these emails are attached as Exhibits 7 and 8 to this Declaration.

11. On November 27, 2019, the Court entered an Order adopting in part the parties' joint proposed discovery schedule. The Court set a deadline of 5:00pm EST on February 5, 2020 for the production of all discoverable material, and further set a deadline of July 17, 2020 for the completion of party depositions. (Dkt. 597.)
12. On January 24, 2020, I sent an email to Kessler's counsel cataloging numerous discovery deficiencies and violations Plaintiffs have discovered with regard to Kessler. In this email, I raised what appeared to be the existence of undisclosed email accounts identified in Kessler's June 17, 2019 email to his counsel. A true and correct copy of this email is attached as Exhibit 9 to this Declaration.
13. On January 30, 2020, less than one week before the Court imposed deadline for production, Kessler's counsel responded to this email and formally confirmed, for the first time, more than two years since the onset of discovery, that Kessler utilized not one, but two, additional email accounts: [REDACTED] and [REDACTED]. A true and correct copy of this email is attached as Exhibit 10 to this Declaration.
14. On February 5, 2020, the deadline for production passed without Plaintiffs receiving documents from any of Kessler's recently disclosed email accounts.
15. Based on Kessler's evident history of failing to accurately disclose his email accounts, Plaintiffs have no basis to believe that Kessler will undertake a good faith, timely review of documents from these newly disclosed email accounts before the Third Party Discovery Vendor is authorized to turn over any documents to Plaintiffs.
16. Plaintiffs are further facing a deadline of July 17, 2020 for the completion of party depositions. Plaintiffs require the immediate production of Kessler's additional documents so as to enable Plaintiffs to fully prepare for Defendant depositions within the allotted five

month time span. This is especially true considering Kessler's self-described role as a leader of the efforts to organize the Unite the Right rally in Charlottesville. (*See* Ex. 11 at 131:13-15 ("Q. And you wanted to be the leader, the organizer, of that rally. A. Yes, sir.").)

17. Any additional delay in Plaintiffs' review of documents from Kessler's recently disclosed email accounts will accordingly only serve to further frustrate the completion of discovery in this action, while simultaneously subjecting Plaintiffs to significant prejudice in connection with their imminent preparation for party depositions.

Dated: February 12, 2020

Respectfully submitted,

/s/ Alan Levine

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, the foregoing was filed with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to:

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I further hereby certify that on February 12, 2020, I also served the following non-ECF participants, via electronic mail, as follows:

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